No. 21172

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALAN HARVEY RICE, LAWRENCE STANFORD TOROKER, EDDIE JAVOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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Preliminary Statement.

On June 16, 1965, a thirteen-count indictment was filed wherein the appellants herein, Javor, Rice and Toroker, and one Michael Anthony De Cristo were charged with violations of 21 U.S.C. 174 and 21 U.S.C. 176(a). All defendants were not charged in each count [Clk. Tr. pp. 2-14]. Eddie Javor was arraigned for these charges on July 6, 1965, and entered pleas of not guilty to counts 10 and 11 in the indictment. The matter was transferred to Judge Curtis for all future proceedings and continued to July 19, 1965, for trial setting [Clk. Tr. p. 16]. Rice and Toroker were thereafter arraigned and entered pleas of not guilty. On November 9, 1965, the trial of Javor, Rice and Toroker commenced before Judge Curtis with the selection of a jury and introduction of evidence by the Government. At this point counsel or Javor, Rice and Toroker were,

respectively, Samuel S. Brody, Erwin Sobel, and P. Basil Lambrose. Mr. De Cristo was not present and the Court forfeited his bail and ordered the issuance of a bench warrant. The Government moved to dismiss counts 6 and 7 of the indictment, which motion was granted by the Court [Clk. Tr. p. 19].

The trial continued from day to day until November 23, 1965, when the jury was instructed by the Court and sent out to deliberate. At 4:55 P.M. they returned with a finding that all three defendants were guilty of each charge with which they were named in the indictment. The case was continued until December 17, 1965, for hearing on motions for new trial and sentencing [Clk. Tr. p. 27]. The Court, on December 17, 1965, sentenced Javor to a term of seven years imprisonment on counts 10 and 11, to run concurrently [Clk. Tr. p. 28]. On January 3, 1966, Rice and Toroker were sentenced under the provisions of 18 U.S.C. 4208(b) for a 90-day study prior to sentencing [Clk. Tr. p. 78], and on May 16, 1966, after receiving reports on Rice and Toroker, their sentences were reduced to five years on each count, to be served concurrently [Clk. Tr. p 79].

Notices of appeal were duly filed on behalf of each of the appellants herein [Clk. Tr. pp. 57, 81 and 82].

Statement of the Facts.

The Government opened its case in chief with suggested stipulations as to the testimony of Herman J. Mueran, a government chemist, and the chain of custody involving certain exhibits [Rep. Tr. p. 76]. Although Government Exhibits 1A, 1B, 1C, 2A, 2B, 2C, 3A, 3B, 3C, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B, 7A, 7B,

7C, 8A, 8B, 8C, 9A, 9B, 10A, and 10B were marked for identification, and the attorney for the Government described a proposed stipulation as to narcotic content and chain of custody [Rep. Tr. pp. 77-79], such a stipulation between Government counsel and defense counsel was never effected, and the witness, Mr. Mueron, was not questioned.

Ricard Salmi, a United States Federal Agent employed by the Federal Bureau of Narcotics for the past four and one-half years [Rep. Tr. p. 83], testified that on May 18, 1965, he met a person named Larry Sterling in Hollywood, California. Later that same evening he and Mr. Sterling drove up to Dominion Road in a Government vehicle [Rep. Tr. p. 83] to 8091 Dominion Way. Mr. Sterling knocked at the door and it was opened by the defendant Toroker [Rep. Tr. p. 84]. Agent Salmi told Toroker that he wanted to purchase an ounce of heroin that evening. Toroker replied that he was expecting an ounce of heroin to be delivered at the residence later that evening and asked Sterling and Salmi to stay in the house and await its delivery [Rep. Tr. p. 85]. Salmi and Sterling had a further conversation with Toroker while seated on the living room couch, where price and quality of the heroin was discussed [Rep. Tr. p. 86]. After a delay of one hour, Salmi told Toroker that he had to leave and got a phone number from Toroker in order to make future contacts, whereupon Salmi and Sterling left the premises. His next contact with Toroker was on May 19, 1965, at 11:00 A.M., when he called Toroker from the Federal Bureau of Narcotics [Rep. Tr. p. 88], and asked him when the ounce of heroin would be available. Toroker responded that he was expecting delivery at his resi-

dence between 7:00 and 9:00 P.M. that evening. Salmi stated that he would be there at 7:00 P.M. Salmi, by himself, again went to the residence on Dominion Way, knocked at the door [Rep. Tr. p. 89], and was admitted by Toroker who introduced him to a person named Mickey. Salmi asked Toroker in Mickey's presence if he had the ounce of heroin and Toroker stated that he did not but was expecting it to be delivered at any time [Rep. Tr. p. 90].

After placing a phone call, Toroker informed Salmi that he was unable to determine when the heroin would be delivered and asked Salmi in De Cristo's presence if he would be interested in purchasing an ounce of cocaine. Salmi responded that he was primarily interested in the quality of the heroin but would possibly purchase cocaine at a later date [Rep. Tr. p. 91]. Toroker informed Salmi that he had access to ample quantities of cocacine and had sold ten ounces of cocaine several days prior thereto, to an unknown person [Rep. Tr. p. 92]. After approximately one hour Salmi informed Toroker that he was leaving for Las Vegas and would contact Toroker upon his return. Toroker asked Salmi for his phone number and Salmi gave him his residence phone number [Rep. Tr. p. 93].

Agent Salmi called Toroker from Las Vegas, Nevada, on May 21, 1965, and Toroker informed him that he had an ounce of heroin in his possession which he would sell for five hundred dollars. That conversation then terminated but Salmi called Toroker back an hour and a half later [Rep. Tr. p. 95] and arranged to pick up the heroin at Toroker's residence later that same evening [Rep. Tr. p. 96]. At 10:30 P.M. on May 21, 1965, Salmi drove to Toroker's residence, alone, where he was

admitted by Toroker and invited to go into the downstairs recreation room where Mr. De Cristo was present. Toroker said, "I will go outside and get it", whereupon he left the room for approximately thirty seconds and returned with a rubber condom [Ex. 1C], which he handed to Salmi [Rep. Tr. p. 97]. Agent Salmi, after some further discussion, examined the contents of the condom and gave Toroker five hundred dollars in official Government funds, in De Cristo's presence [Rep. Tr. p. 99]. Toroker told Salmi as he was leaving that he and De Cristo were going to New York for the purpose of selling heroin, and if Salmi wanted any additional heroin, he should speak to Alan Rice [Rep. Tr. p. 100].

Salmi's next contact with Toroker was May 23, 1965, when Toroker called him at his residence [Rep. Tr. p. 101] and asked Salmi if he was satisfied with the narcotics. Salmi replied that he was not, whereupon a further discussion ensued relative to possible future sales of cocaine and heroin [Rep. Tr. p. 102]. On May 24, 1965, at 6:45 P.M., Salmi called the residence on Dominion Way and the phone was answered by Alan Rice [Rep. Tr. p. 103], who told Salmi that he would take care of Salmi's business and that he had a package of coke and three of the other at the residence, which he asked Salmi to purchase. Salmi told Rice that he didn't have enough money for the whole deal but would obtain additional funds and call Rice the next evening.

On May 25, 1965, at approximately 9:00 P.M. [Rep. Tr. p. 105], Salmi and agent Charles Sherman drove to the residence on Dominion Way and were admitted by Mr. Rice, to whom Salmi introduced Sherman as his

associate and asked Rice if he had the package [Rep. Tr. p. 107]. Rice answered affirmatively and stated that it was downstairs, whereupon they all walked down to the lower level of the house, where they looked for the package in a closet. A few minutes later De Cristo arrived [Rep. Tr. p. 108] and located a package in the closet, which he handed to Salmi [Ex. 2C; Rep. Tr. p. 109]. A sales price of $450 per ounce was agreed upon, the narcotics were weighed and two ounces set aside, when De Cristo stated they could have the remaining balance of the heroin for $195.00, which was agreed to by Salmi [Rep. Tr. p. 111]. Salmi then gave Rice $1,090 in official Government funds and put the two rubber condoms in his pocket [Rep. Tr. p. 112]. Rice told Salmi and Sherman that he would soon be in a position to sell kilogram quantities of heroin and Salmi replied that he would be interested in purchasing such quantities [Rep. Tr. p. 113]. As Salmi and Sherman were leaving, Rice told them that he could supply cocain for less than $1,000 per ounce [Rep. Tr. p. 114] and that if Sherman could come by the house, he would furnish him with a cocaine sample [Rep. Tr. p. 115].

On June 2, 1965, at 1:00 P.M., Salmi returned a phone call which Toroker had made earlier in the day to Salmi's residence. Toroker told Salmi he had "talked to the man" and could, within 24 hours notice, if Salmi had sufficient funds, deliver a kilogram of heroin in Los Angeles [Rep. Tr. p. 116]. At 9:30 P.M. that same day Salmi and Sherman drove up to the Dominion Way residence [Rep. Tr. p. 122] and were directed to the downstairs area by Mr. Rice [Rep. Tr. p. 123], where Rice produced a slip of paper [Ex. 11], which set forth prices relative to the purchase of European white and Mexican brown heroin [Rep. Tr. p. 127].

Salmi, Sherman and Rice had a conversation relative to the purchase price of different qualities of heroin, when Toroker came into the room and gave Salmi and Sherman three brown hand-rolled cigarettes each [Rep. Tr. p. 130; Ex. 4C], shortly after which Salmi and Sherman left the premises [Rep. Tr. p. 133]. Prior to leaving the residence, however, Rice told Salmi that he would call Salmi at his residence the following day in order to advise him of any further details regarding the kilogram of heroin transaction [Rep. Tr. p. 141]. At approximately 9:30 A.M. on June 3, 1965, Salmi received a phone call from Rice, at his Manhattan Beach residence, who informed him that the kilogram of heroin would be delivered in Los Angeles from Mexico late that evening, or the next evening. At 1:00 P.M. that same day Salmi called Rice and told him that he would be unable to meet on that day as he had other business [Rep. Tr. p. 142] and Sherman was not in Los Angeles with funds at that time. Agent Salmi called Rice on June 4, 1965, at 1:00 P.M. and asked about the heroin delivery. They arranged to meet in the Continental Hotel at 2:30 that afternoon, at which time and place Rice told Salmi that the kilogram of heroin would have to be delivered in two stages within a short time of one another [Rep. Tr. p. 143]. Salmi called Rice several times that day (June 4, 1965) and was eventually told there was no information about when the heroin would be delivered and was told to call Toroker the next morning [Rep. Tr. pp. 144-145].

Early in the afternoon of June 5, 1965, Salmi called Rice at his residence and was told by Rice that the kilogram of heroin should be delivered in Los Angeles the following evening and that later in the day the

source of supply would deliver a heroin sample to Rice's residence. At 7:00 P.M. the same day Salmi again called Rice at his residence and was told that the source of supply would be at Rice's residence [Rep. Tr. p. 178] in ten or fifteen minutes with a heroin sample. Salmi told Rice that he would be at Rice's residence as soon as possible to obtain a sample.

Agent Salmi arrived at the Dominion Way residence at approximately 9:00 P.M. that evening and noticed a new bronze-colored Buick station wagon, NRE-901, parked by the front door [Rep. Tr. p. 179]. He was admitted by a young woman he believed to be Rice's wife and was told that Rice was downstairs with Larry (Toroker). Agent Salmi started to walk downstairs when he met Rice, at the head of the stairs. Rice asked Salmi to wait in the front room as he had some business to transact and Salmi waited in the front room for about ten minutes, where he had a conversation with Mrs. Rice [Rep. Tr. p. 180]. Agent Salmi then heard a car door slam and Rice appeared in the kitchen and motioned for Salmi to follow him downstairs. As Salmi was walking downstairs, he heard the sounds of a vehicle being driven away from the front of the residence. Salmi asked Rice if he had the sample and Rice stated that he did. At this time Toroker entered the room from an outside door and had in his possession [Rep. Tr. p. 181] two knotted rubber condoms [Exs. 5C and 6B]. Toroker stated that one condom contained Mexican brown heroin [Rep. Tr. p. 182]. Agent Salmi took a portion of the lighter powder and placed it inside of an empty condom he was carrying for that purpose and placed a portion of the darker powder in some paper slips which Rice provided [Rep.

Tr. p. 184]. After some further conversation relative to the purchase of heroin, Toroker told Salmi that he was expecting the kilogram of heroin to arrive the next evening and Salmi informed Rice that he would call him the next day. The next contact was two days later on June 7, 1965, at 9:30 A.M., when Salmi received a call at his residence from Rice [Rep. Tr. p. 186]. Rice informed Salmi that he had just received ten ounces of heroin and had it in his possession at the Dominion Way address, where the transaction was to take place. Salmi told Rice that he would contact Sherman and have him return to Los Angeles with the necessary funds and that he would call Rice later that afternoon [Rep. Tr. p. 187].

At 1:00 P.M. on June 7, 1965, Salmi called Rice and asked him if he still had the ten ounces of heroin and upon receiving an affirmative response told him that Sherman would be in the city within a matter of hours with the available funds and that when he arrived they would go to the Dominion Way address, examine, test, weigh, and purchase the heroin [Rep. Tr. p. 188]. Agents Sherman and Salmi arrived at the Dominion Way residence at 4:30 P.M. that same day and were admitted by Rice; Toroker was not present at this time [Rep. Tr. p. 189]. Salmi asked Rice if he had the heroin and Rice said he did and would get it. In less than a minute Rice returned with a small brown paper bag that he handed to Salmi, which Salmi opened and observed two large condoms which each contained four smaller condoms [Exs. 7C and 8C; Rep. Tr. p. 190]. It appeared that two of the condoms were missing, which Rice said Toroker could account for when he returned. When Toroker entered the premises a few min-

utes later he was asked about the two condoms, left the premises and returned shortly with two condoms [Rep. Tr. p. 191], which he said were the two which had been opened for the purpose of extracting a sample from them. Agent Sherman then went out to his car and came back with a scale to weigh the narcotics [Rep. Tr. p. 192]. It was at this time that Salmi determined to place Rice and Toroker under arrest; however, prior to the actual arrest the agents had a short conversation about the price of this partial delivery with Rice and Toroker [Rep. Tr. p. 193].

After the arrest of Rice and Toroker, they were asked by Agent Voll if there was any more narcotics around the area and Rice responded that there was some heroin and cocaine on the outside of the residence, to which he led the agents under some ice plants [Exs. 9B and 10B; Rep. Tr. p. 199].

The testimony of Agent Charles Sherman consumed a considerable amount of time [Rep. Tr. pp. 241-295, 299-400]; however, it was in the main corroborative of the above-summarized testimony of Richard Salmi and will not be set forth, except where it adds materially to the testimony of Agent Salmi.

Agent Sherman's attention was directed to a telephone call received at the Dominion Way residence at 7:00 P.M. that evening, at which point counsel for Javor asked to address the Court out of the presence of the jury [Rep. Tr. p. 262]. Counsel for Javor objected to the introduction of the phone call, which objection

was overruled [Rep. Tr. p. 264]. Counsel for Javor also raised the question of whether or not Rice's alleged consent to monitor the call was freely and voluntarily given [Rep. Tr. p. 265] and asked to take the witness on voir dire in the jury's absence on this point [Rep. Tr. pp. 269, 270]. The witness was preliminarily questioned by the United States Attorney, in the jury's presence [Rep. Tr. p. 70], and then taken on *voir dire* by defense counsel, also in the jury's presence [Rep. Tr. p. 273]. Eventually the defense objections were overruled and Agent Sherman related the conversation in which a male voice named Eddie (later identified by Sherman as Eddie Javor) had an incriminating conversation with Rice and said he would be at the house in an hour to pick up the money [Rep. Tr. p. 282]. Approximately 15 to 20 minutes later Eddie Javor was arrested in the driveway outside of the Dominion Way residence [Rep. Tr. p. 283]. After Javor's arrest he was searched and a motel receipt [Ex. B] was taken from his person [Rep. Tr. p. 287].

John Tony Cagle testified that on June 5, 1965, he and Eddie Javor went to Torrance and purchased an automobile [Rep. Tr. p. 147] from Mr. Harry Okamoto [Rep. Tr. p. 148]. The car was purchased in the name of John P. Dexter by Tony Cagle for $75.00, which Javor had given to him [Rep. Tr. p. 149]. He met Javor at 10:00 P.M. that same evening and Javor was in the company of a lady [Rep. Tr. p. 152]. Cagle drove the 1952 Buick he had just purchased to Tijuana

and Javor drove his 1965 Buick to Tijuana [Rep. Tr. p. 154]. After they arrived in Tijuana, Cagle parked his 1952 Buick behind the La Sierra Motel and checked in as John Dexter. Javor and the woman also checked into the hotel at about 4:00 or 5:30 the morning of June 6, 1965. Cagle went to sleep and saw Javor at 2:00 P.M. that afternoon when Javor gave him tickets to the bull fights [Rep. Tr. p. 156], which Cagle attended. Cagle again saw Javor alone later that night in Cagle's motel room when Javor showed him a bag containing two prophylactics. At that time Cagle didn't know it was cocaine and Javor asked, "What can we do with this?" Cagle took the bag and put it into his coat pocket. Later that evening he returned to Los Angeles with Javor, the girl that came with them, and two other persons, in Javor's 1965 Buick. Cagle carried the packages with him back to Los Angeles [Rep. Tr. p. 158]. Cagle returned the contraceptives to Javor in Los Angeles [Rep. Tr. p. 159].

As can be seen the foregoing statement of facts presents the government's case in its best light. This is the manner in which an appellate court must review the record on appeal and it is from this point of view that the appellants write their opening brief.

ARGUMENT.

The Defendants Were Denied Due Process of Law in That They Did Not Have a Proper Determination Outside of the Jury's Presence That Their Confessions Were Voluntary.

The "confessions" of Rice and Toroker first came before the Court below when Charles E. Voll was called as a witness for the United States. He was a Federal Narcotics Agent and a group leader in the Los Angeles Office [Rep. Tr. p. 443]. His attention was directed to June 7, 1965, at 9:00 P.M. by Government counsel, when Mr. Lambrose, counsel for Toroker, requested a conference at the bench where he asked for a hearing on whether certain confessions, which were going to be the subject of testimony by Mr. Voll, "were voluntary and not made under duress" [Rep. Tr. p. 444]. Counsel for Toroker urged that the defendants were under the influence of LSD when they confessed and that there was an unreasonable delay before they were arraigned [Rep. Tr. p. 445]. The Court expressed concern about the defense contention that the defendants were under the influence of LSD when they confessed; and even Government counsel conceded that this was going to be a question of fact [Rep. Tr. p. 446].

After further discussion between the Court and counsel, it was determined that the jury would be excused and the Court would take evidence in their absence. Agent Voll testified that at 9:45 on June 7, 1965, he spoke to Alan Rice in Room 414 of the United States Courthouse Building. Prior to his taking any statement, he ascertained from Rice that he was not under the influence of any drug or narcotic [Rep. Tr. p. 452]

and had Rice relate to him the events leading up to his arrest. Agent Voll again warned Rice of certain constitutional rights, but Rice said he wanted to make the statement, which he did [Rep. Tr. p. 453].

It is interesting to note that this Constitutional warning was given after Rice had completely confessed orally to Agent Voll, but prior to his written statement [See Rep. Tr. pp. 452-453], which would make any warning a nullity.

At 12:40 A.M. on June 8, 1965, Agent Voll spoke to Toroker in Room 414 of the Federal Building, where Toroker denied that he was addicted to narcotics [Rep. Tr. p. 454] and was not then under the influence of narcotics. Agent Voll then advised Toroker of his constitutional rights, whereupon Toroker waived the services of an attorney and made a statement [Rep. Tr. p. 455], which he reviewed, corrected and signed in Agent Voll's presence [Rep. Tr. p. 456]. Agent Voll further stated that Rice and Toroker appeared to be normal when they made, corrected and signed their respective statements [Rep. Tr. p. 460].

Mr. Lambrose, counsel for Toroker, first offered to submit the Court the medical reports of Dr. Von Hagen and Dr. Tweed on the issue of voluntariness, in addition to certain extracts from medical textbooks [Rep. Tr. p. 464]. Counsel for the Government suggested the appointment of an independent expert, Dr. Sidney Cohen, to determine sanity at the time of the offense.

The Court recognized at this point that the crux of the matter was going to be the credibility afforded Rice and Toroker's testimony on the extent of their use of LSD, whereupon counsel for Toroker stated that he

had witnesses who would establish this use as a matter of fact [Rep. Tr. p. 465].

It was at this point that the Court clearly evidenced what it believed its role to be at Reporter's Transcript pages 468-469, by stating:

> "I have not read the doctors' reports but it occurs to me in view of the testimony that it is going to become a factual question the extent to which the defendants have been using and were using LSD at the time. If they were not using it and were not under the influence then there will be no question but what this is admissible or that it is valid.
>
> "If the jury believes the evidence, which will be conflicting, that the defendants were under the influences from whatever the evidence then the admission or the confession will be deemed not voluntary and will be disregarded. Our question at this point is, is this a Court question or a jury question. I am of the opinion, without having read all this, that it is a jury question and not a Court question.
>
> "There is evidence that the jury may well find that the defendants were normal and acting normal and were not acting under the influence of any drugs or any stimulants.
>
> "The defendants will dispute it. Perhaps the jury ultimately will decide that the defendants are right.
>
> "We are talking about the admissibility at this point. It seems to me we have a fairly simple question and that is the evidence as it has been adduced so far I think is such that the confessions

> must be admitted with the proper instruction to the jury at the appropriate time as to what the effect of it is and how they are to handle it."

A reading of the above comment reveals that the Court below was clearly of the opinion that all factual controversies on the issue of voluntariness would have to be submitted to the jury with appropriate instructions. This, as will be shown *infra,* was a misunderstanding of the then applicable law.

The above proceedings took place on Friday, November 12, 1965. It was at this point that the case was recessed until Tuesday, November 16, 1965, at 9:30 A.M., when the Court again indicated that "this is a conflict in the evidence which I think must go to the jury" [Rep. Tr. p. 477], and

> "This has become a question which I feel the jury must ultimately decide, and I am admitting them with the thought that there is evidence which must go to the jury. It is up to them to make the decision ultimately in accordance with the instructions which I will later give them as to whether or not these confessions are intelligently and knowingly made." [Rep. Tr. p. 479].

After Agent Voll had been examined by Government counsel and cross-examined by defense counsel in the jury's presence, the Court submitted the issue of voluntariness to the jury, wherein it stated:

> "By overruling the objections which I just overruled, I have made no ultimate decision. All I have decided is that there is sufficient evidence both ways to justify it being brought before the jury for determination. So you must withhold

any judgment upon the effect of this admission until you have heard all of the evidence. Then you may consider it only if you find that it has been made voluntarily and knowingly and with a full understanding of the import of the confession or admission." [Rep. Tr. p. 555].

Approximately one year and a half prior to the trial of this case, the United States Supreme Court published its opinion in *Jackson v. Denno,* 378 U.S. 368 (1964), wherein the procedure for handling the issue of voluntariness of confessions was dealt with at some length. That case and the one at bar have one very important and striking similarity. In both cases the Court was under the impression that if there was a factual issue on voluntariness, the Court must leave any final determination on the subject to the jury (378 U.S. at 377). This very procedure was deemed a denial of due process of law which compelled reversal by the Court in *Jackson v. Denno, supra*, at 378 U.S. 376-7. In that case the Court held that the issue of voluntariness must be determined after a full and complete factual hearing on the matter "in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined" (378 U.S. 380) by a trier of fact other than the jury which determines guilt or innocence (See the Court's observations at 378 U.S. 391 and footnote 19 on said page).

As in *Jackson v. Denno, supra,* the failure to hold a proper evidentiary hearing and reliably determine certain factual issues out of the jury's presence are prejudicial errors and require a reversal.

The Court Below Committed Prejudicial Error by the Manner in Which It Instructed the Jury on Entrapment.

Pursuant to request by the defendants Rice and Toroker, the Court at Reporter's Transcript pages 1441-1442 gave the following instruction on entrapment:

> "Two of the accused have offered a defense of unlawful entrapment as to each of the crimes charged against them in the indictment.
>
> "The law recognizes two kinds of entrapment. There is unlawful entrapment and lawful entrapment.
>
> "Where a person has no previous history or purpose to violate the law but is induced and persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment because the law as a matter of policy forbids a conviction in such a case.
>
> "On the other hand, where a person already has the readiness and the willingness to break the law, the mere fact that the Government agents provide what appears to be a favorable opportunity is no defense, but it is lawful entrapment.
>
> "When, for example, the Government has reasonable grounds for believing that a person engaged in illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from such suspected person.
>
> "If, then, the jury should find from the evidence before them that anything at all occurred respecting the alleged offenses involved in this case, the

accused was ready and willing to commit crimes such as those charged in the indictment whenever an opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment.

"If, on the other hand, the jury should find that the accused has no previous intent or purpose to commit any offense of the character here charged and did so only because he was induced or persuaded by some person of the Government, then the prosecution has seduced an innocent person and the defense of unlawful entrapment is a good defense and the jury should acquit the accused."

This is substantially the same instruction on entrapment as is found in Federal Jury Practice and Instructions, Mathes and Devitt, Section 10.12, which this Circuit and the First Circuit have found so erroneous as to require reversal therefor, *Notaro v. United States,* 363 F. 2d 169 (9th Cir. 1966); *Sagansky v. United States,* 358 F. 2d 195 (1st Cir. 1966); *Kadis v. United States,* 373 F. 2d 370 (1st Cir. 1967).

What is even more pertinent in this case is that the Court left out the most crucial portion of the entire instruction when it stated:

"If, then, the jury should find from the evidence before them that anything at all occurred respecting the alleged offenses in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever an opportunity was offered and the Government merely offered the opportunity the accused is not entitled to the defense of unlawful entrapment."

Whereas the Mathes and Devitt instruction is as follows:

> "If then the jury should find *beyond a reasonable doubt* from the evidence in the case that, *before* anything at all occurred respecting the alleged offenses in this case the accused was ready and willing to commit crimes such as charged in the indictment whenever opportunity was offered, and that the Government agents did no more than offer the opportunity the accused is not entitled to the defense of unlawful entrapment." (Emphasis supplied).

A comparison of the instruction that was undoubtedly intended to be given with that actually given by the Court reveals that the jury was not told they had to find a predisposition on the accuseds' part to commit *before* the instant events *beyond a reasonable doubt* before they could convict. In our situation the jury had no standard, whereas in *Notaro v. United States, supra,* they were at least instructed on reasonable doubt in connection with this charge and predisposition to crime before any events occurred with regard to the specific facts in the case.

It Was Prejudicial Error to Admit Over Objection Other and Unrelated Crimes of Eddie Javor.

After being cross-examined by Government counsel about his trip to Mexico with Mr. Cagle, the following questions were asked of Mr. Javor with these ensuing answers, at Reporter's Transcript page 1217:

> "Q. You mentioned that you have, in fact, been convicted of a felony. A. Yes, I have.

Q. And that felony concerns narcotics? A. It concerns marijuana.

Q. Well, narcotics? A. Marijuana.

Q. Marijuana.

In regard to your prior felony conviction for marijuana you are aware that when you leave the United States through the border, the port of entry at San Ysidro, you must register at the port of entry there?"

At this point counsel for Javor objected and a conference was held at the bench where the Court asked Government counsel for an offer of proof, whereupon Government counsel briefly explained that certain convicted felons were obliged to register with Customs when they left and returned to the country. Government counsel went on to say that Javor had, in fact, registered on prior occasions,

> "but he did not on this particular weekend register, which is a material fact going to his knowledge, part of this particular offense in that it would show that he did not want to call attention to himself because they were bringing the contraband in. So this is most material and relevant." [Rep. Tr. p. 1218].

The Court apparently accepted the above-quoted offer of proof and admitted the evidence of Javor's failure to register [Rep. Tr. p. 1221]. Government counsel then proceeded to show that Mr. Javor did not register when he entered and left the country on the weekend in question and that he was aware that he was required by law to so register [Rep. Tr. pp. 1222, 1223].

At no time during the cross-examination was it brought out by Government counsel that Javor had

registered at other times he crossed the Mexican border. This is highly material because the actual evidence did not conform to the Government's offer of proof as set forth above, which would mean that the jury was never given any information that Javor had registered in the past and might thereby infer that he failed to register on this particular occasion because of guilty knowledge. What we have left, then, is evidence of an unrelated crime being introduced into evidence against Mr. Javor, "and its admission over objection constitutes prejudicial and reversible error," *Dias-Rosendo v. United States,* 364 F. 2d 941, 944 (9th Cir. 1966); *De Vore v. United States,* 368 F. 2d 396 (9th Cir. 1966).

It Was Error to Admit Those Portions of the Statements of Javor's Co-Defendants Rice and Toroker Which Referred to Javor Under the Guise of Impeachment of Said Co-Defendants.

Prior to the testimony of Federal Narcotic Agent Charles E. Voll regarding the Rice and Toroker confessions there was a conference in chambers (which was discussed in the appellant's first point on appeal), where counsel for Javor requested that any reference to Javor be deleted from the Rice and Toroker confessions [Rep. Tr. p. 479]. The Court, after reading the subject confessions, concluded that the confessions were devastating insofar as Javor was concerned and did not think they should be admitted as to him [Rep. Tr. p. 481]. In order to avoid this very problem, it was agreed between the counsel for Rice and Toroker that they would stipulate that their clients admitted doing the offenses charged in the indictment to Agent Voll [Rep. Tr. p. 484], which stipulations were actually

entered into between the Government and Rice and Toroker in front of the jury [Rep. Tr. p. 514].

Mr. Toroker took the stand and testified in his own behalf on both direct and cross-examination at considerable length [Rep. Tr. pp. 626-736, 869-1014]. During his cross-examination, counsel for the Government asked that Exhibit 15, which had previously been marked for identification, be handed to the witness. (Ths exhibit was a signed confession of Mr. Toroker). At this point counsel for Javor objected to the use of that particular exhibit because of its highly prejudicial effect as to Javor [Rep. Tr. p. 903], and further stated that the real purpose beyond the proposed introduction of these "impeaching" statements was to place before the jury evidence which was inadmissible against Javor [Rep. Tr. p. 904].

A fair reading of the record does, unfortunately, support counsel's statements in regard to the Government's reasons for introducing certain portions of Toroker's confessions. It is hornbook law that the statements of Toroker made after his arrest are not admissible against a co-defendant and the only relevancy of such statements is that they may be admissions, confessions, or impeachment of his testimony in court. At this point in the trial, the only relevant consideration was impeachment because it had previously been stipulated that both Rice and Toroker admitted the offenses charged in the indictment in their confessions. The one purpose of the statements to be offered could therefore be only for the impeachment of Toroker. In this regard counsel for Toroker was willing to stipulate that Toroker had been impeached in his previous confession and had further stated in his confession that per-

sons other than those he had named in court were involved in the subject crimes [Rep. Tr. pp. 912, 913]. Counsel for Toroker further offered to stipulate to any specific impeachment the Government desired, so long as Mr. Javor's name could be eliminated therefrom [Rep. Tr. pp. 913, 914, 920]. Counsel for Javor also requested that Javor's name be deleted from any statements of Toroker [Rep. Tr. pp. 928, 929].

When the proposed stipulations of Toroker's counsel are taken in conjunction with the stipulation that had been already entered into, it is regretfully apparent that the only intention of the Government in introducing the statements of Toroker was to illegally and unlawfully have them considered as to Javor only. This assertion is re-enforced by a reading of the allegedly "impeaching" statements of Toroker [Rep. Tr. pp. 948-974], where it is quite apparent that the only purpose served is to incriminate Eddie Javor.

In reaching its decision to admit the confessions of Rice and Toroker, wherein the name of Eddie Javor was mentioned as a supplier of narcotics, in a thoroughly prejudicial manner as originally determined, the Court below was undoubtedly relying on *Paoli v. United States,* 352 U.S. 232 (1957). The Supreme Court in a five to four decision held that it was not error to refuse to delete the petitioner's name from the confession of a co-defendant in a joint trial made after the termination of a conspiracy (which was never alleged or proven by competent evidence in our case) where the Court properly admonished and instructed the jury that the confession was to be used only to determine the guilt (or credibility as in our case) of the confessing defendant.

These very issues are now before the United States Supreme Court in *Gilbert v. California,* 384 U.S. 985 (1966), which has already been briefed and argued and should be decided in the very near future. This instant case, however, varies very greatly from *Paoli v. United States, supra,* in some very important particulars which would not bring it under the rule of that case even if it were controlling law in this case:

1. The Court in *Paoli* listed several important factors which led them to believe that the jury followed the Court's instructions. Factor No. 4 listed by the Supreme Court merits special attention, as the Court stated, "In the main Whitley's confession merely corroborated what the Government already had established. In the light of the Government's uncontradicted testimony implicating petitioner in the conspiracy, the references to petitioner in the confession were largely cumulative." In this instant case that yardstick does not apply as the Government produced little other credible evidence which would implicate Javor. A similar situation to that found in this instant case was discussed by the Court in *United States v. Cianchetti,* 315 F. 2d 584, 590 (2d Cir. 1963), where the Court analyzed *Paoli v. United States, supra,* in determining whether an appellant has been so substntially prejudiced as to require reversal. The Court in that case noted that the evidence against one of appellants was not overly powerful, in addition to which it was denied by the appellant in the Court below. In our case the evidence against Javor, outside of these hearsay statements, was in-

substantial and Javor denied or explained all of the evidence against him. It is true that no limiting instructions were given in *United States v. Cianchetti, supra;* however, this is only one of the two criteria discussed in that case.

2. In *Paoli v. United States, supra,* any deletion of the petitioner's name from the co-defendant's confession was determined to be impractical (352 U.S. at 237), whereas in our case such deletions were not only practical but were suggested by defense counsel [Rep. Tr. pp. 928, 929]. *United States v. Jacangelo,* 281 F. 2d 574, 576 (3rd Cir. 1960); *Oliver v. United States,* 335 F. 2d 724, 731-732 (D.C. Cir. 1964).

3. The alleged purpose of introducing certain portions of the Rice and Toroker confessions was for the purpose of impeaching the testimony of Rice and Toroker. It will be recalled that counsel for Toroker agreed to stipulate that Toroker had been impeached by his previous confession and particularly that persons other than those named by him in court were listed in his confession as being involved in the narcotic transactions [Rep. Tr. pp. 912-913]. Counsel for Toroker even offered to stipulate to any specific impeachment the Government desired, so long as Javor's name could be eliminated therefrom [Rep. Tr. pp. 913, 914, 920]. The only purpose in this alleged impeachment, therefore, was to place incriminating evidence involv-

ing Javor before the jury. In this regard the Court's attention is respectfully directed to *United States v. Gordon,* 253 F. 2d 177, 183 (7th Cir. 1958), where the Court found reversible error in an analogous situation when the hearsay admissions of a co-defendant were admitted as impeachment.

It should be additionally noted that the "impeaching" statements of Rice and Toroker were never established properly as being free and voluntary. See *supra.*

The Judgment of the Court Below Must Be Reversed for the Reason That It Was Never Established That Certain Exhibits Were in Fact Narcotics.

As is noted in the opening paragraph of the statement of facts, *supra,* there was neither expert testimony nor a stipulation regarding the narcotic content of the exhibits which the Government contended were narcotics. The Government in final argument specifically relied on the inference which arises under 21 U.S.C. Section 174, when the defendant is shown to have possession of the narcotic drug in order to convict [Rep. Tr. p. 1262], and the Court gave the Government's requested instruction [Clk. Tr. p. 42] in this regard [Rep. Tr. p. 1436].

This has been recently held to be reversible error in the Ninth Circuit, *Cook v. United States,* 362 F. 2d 548 (9th Cir. 1966).

Evidence of Possession of Heroin as to Javor Was Insufficient and the Argument of Counsel and Instructions Given by the Court With Regard Thereto Were Unlawful and Illegal as a Matter of Law.

The appellant Javor is charged in counts ten and eleven of the indictment with receipt, concealment, transportation and sales of heroin in violation of 21 U.S.C. 174. In closing argument the Government urged that the inference provided by the possession of heroin should apply in this case [Rep. Tr. p. 1262] and the jury was so instructed by the Court [Rep. Tr. p. 1436].

There was no direct or sufficiently substantial evidence of Javor's possession of the heroin described in counts ten and eleven of the indictment to warrant the giving of that instruction to the jury. Despite the fact that Javor is named as a principal in the indictment and the Court instructed the jury on aiding and abetting [Rep. Tr. pp. 1414-1421], it is apparent that he was not shown to be in actual or constructive possession of the heroin in question and the giving of the above instruction was error, *Hernandez v. United States*, 300 F. 2d 114, 120 (9th Cir. 1962).

It has also been recently held in the Ninth Circuit that the aiding and abetting instruction and common scheme and plan instruction such as that given in this case in a similar factual situation constituted reversible error. *Hill v. United States,* No. 21126 (9th Cir. 1967).

The evidence against Javor is insufficient to sustain his conviction on appeal.

The Court Below Committed Prejudicial Error When It Instructed the Jury That a Witness Is Presumed to Speak the Truth.

The Court instructed the jury at Reporter's Transcript pages 1417-1418 as follows:

> "An inference is a deduction or a conclusion which reason and common sense leads the jury to draw from facts which have been proved.
>
> "A presumption is a conclusion which the law requires the jury to make from particular facts in the absence of convincing evidence to the contrary.
>
> "A presumption continues in effect until overcome or outweighed by evidence to the contrary, but unless so outweighed the jury are bound to find in accordance with the presumption.
>
> "Unless and until outweighed by evidence to the contrary, these are a few instances in which the law makes presumptions or requires you to make presumptions.
>
> "The law presumes that a person is innocent of a crime or wrong; *that a witness speaks the truth. . . .*" (Emphasis Supplied).

The above-quoted instruction would appear to be that in Mathes & Devitt, Federal Jury Practice and Instructions p. 387, Section 71.04, with one very important exception. In the book it does not state that "the law presumes that a witness speaks the truth" as the jury was instructed in this case. Even the standard jury instruction in Mathes & Devitt, *supra*, p. 111, Section 9.01, says that: "Ordinarily, it is *assumed* that a witness will speak the truth" (Emphasis supplied). Again at Reporter's Transcript page 1423 the Court gave the credibility of witness's instruction but used "presumed" instead of "assumed".

If the jury followed the Court's instructions, they would be obliged to conclude that they must believe that the Government agents spoke the truth "in the absence of convincing evidence to the contrary." One presumption logically carries the same weight as another, and the appellant contends he was denied the presumption of innocence in this trial and, as such, was deprived of due process of law and a fair trial. See *United States v. Meisch,* 370 F. 2d 768, 773-4 (3rd Cir. 1966). The defendants in this case were deprived of being clothed in a presumption of innocence until there is sufficient evidence to the contrary but after the first government witness testified were presumed guilty.

The Court Below Erred in Not Allowing Javor's Counsel to Show That John Tony Cagle Had Been Released on His Own Recognizance After Testifying Against Javor.

Eddie Javor's counsel called Federal Bureau of Narcotics agent Paulus as his witness [Rep. Tr. p. 1145] and sought to show that immediately after his testimony in this case, Cagle was released from jail on his own recognizance [Rep. Tr. p. 1148]; and counsel was thereafter precluded from going into that area.

Mr. Cagle's testimony, which was summarized, *supra,* was the strongest evidence against Javor in the trial because without it a conviction would have been impossible. When Javor was denied the right to show that this admitted perjurer had a motive for falsely testifying, he was denied a fair trial and due process of law.

Rice and Toroker Were Not Allowed to Prove Their LSD Consumption, Thus Destroying Their Defense of Insanity in the Eyes of the Jury.

One of the two defenses asserted by Rice and Toroker was insanity; and one of the crucial issues in that defense was the amount of LSD consumed by Rice and Toroker during the period in question. Stephen Bryan Cole, a defense witness, testified that he saw the defendants Rice and Toroker take substantial quantities of LSD during the period in question [Rep. Tr. pp. 553, 557], and that whenever he saw them—which was three or four times a week—they were always under the influence of LSD [Rep. Tr. p. 558].

The very next defense witness was Linda Marie Quante.—As soon as she took the stand, the Court indicated that it would not admit any testimony that was merely cumulative of that given by Mr. Cole, the preceding witness [Rep. Tr. pp. 577-578]. The very same thing occurred when the next witness, Regina Champlain, testified; only this time the Court actually sustained an objection on the ground that her testimony would be cumulative [Rep. Tr. pp. 595-596].

The crux of this problem was fairly summarized by counsel for the Government in closing argument, when she stated:

> "The next point is why the Government didn't bring in examining psychiatrists to examine the defendants in this regard. Now, you have two psychiatrists who testified in this case. We start with one basic principle, which is not refuted, and that is the one psychiatrist who did in fact examine the defendants Rice and Toroker, who said that at the time of their examination in September these men were sane, legally sane. They are sane today.

"The only thing the man said was that they were insane at the time of the offense.

"Now, you heard the testimony of both of these psychiatrists. Just what is going to prove whether or not these men were insane at the time of the offense? The psychiatrists can stand here all day long and say, 'Yes, it is possible LSD can make you insane.'

"But they come down to one thing, and that is this: You don't know unless you have seen this individual affected by LSD. You don't know unless this individual—these defendants are telling you the truth in saying that all these times they were under the influence.

"So it doesn't matter how many psychiatrists take the stand, except to aid us in understanding more about LSD. What does matter is if you are going to believe these men, then that is the test right there."

That argument was perfectly correct, because Dr. Tweed assumed the defendants were telling him the truth about their LSD consumption and used this as a basis of his finding that they were insane at the times of the instant crimes. So it was very much in issue how much LSD the defendants used and how often they were using it.

It is the appellant's contention that they were deproved of a fair trial and due process of law when the Court would not allow them to establish the frequency and quantity of their LSD usage. This error becomes all the more prejudicial when the Government argues that very point to the jury, having first precluded the

defendants from establishing the fact of their usage of LSD.

This situation is similar to the defense of alibi, when the defendant has multiple witnesses. Surely at some point such evidence does become cumulative, but not after one witness, as in this case.

The Jury in the Court Below Was Not Properly Instructed on the Issue of Insanity.

The appellants herein are aware that the instruction on insanity given by the court below [Rep. Tr. pp. 1441-1442] reflect the current status of the law in this Circuit, *Sauer v. United States,* 241 F. 2d 640 (9th Cir. 1957) and *Maxwell v. United States,* 368 F. 2d 735 (1966). This honorable Court did, however, state in *Maxwell v. United States, supra,* at 743 that it might again, in a proper case review the entire problem which would mean consideration of the A.L.I. formulation of the insanity instruction. See *United States v. Freeman,* 357 Fed. 606 (2d Cir. 1966).

It is respectfully submitted that the evidence of insanity in this case is sufficient for such consideration by this court and that the present instruction on insanity which was given in this case deny the appellants due process of law and a fair trial.

Conclusion.

It is respectfully submitted that based upon the record in this case the judgment of the court below should be reversed.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. G. SHERMAN